No. 1126

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Plaintiff in Error,

vs.

PRISCILLA DOBLER, *Defendant in Error.*

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UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

Brief of Defendant in Error.

WARBURTON & McDANIELS,
Counsel for Defendant in Error.

SUMNER INDEX PRINT

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STATEMENT.

We think it well to call the court's attention now to the fact that plaintiff in error has abandoned or waived all of its assignments of error relating to the charge made by the court or the refusal of the court to give the instructions requested by it. These assignments of error could not be considered by the court, for the reason that the record discloses that all the exceptions taken by the plaintiff in error to the court's charge, or its refusal to charge as requested, were taken after the jury had retired to consider their verdict. This court, in the case of *Stone v. U. S.*, 64 Fed. Rep. 667, held that it would not consider assignments of error based on a record of this kind.

On the 20th day of October, 1902, Frederick C. Dobler made application in writing to the Mutual Reserve Life Insurance Company of New York for a policy in the sum of $10,000, at Baker City, Oregon. The application

was executed at that place, delivered into the hands of the representative of the company, who forwarded the same to its home office in New York, where it was accepted and a policy of $10,000 issued in pursuance thereof, which was forwarded to the representative of the company at Baker City, Oregon, where it was delivered to the insured upon his payment of the premium to the representative of the company by two notes. One-third of the premium was paid by note drawn up by the company in New York and signed by Mr. Dobler in Baker City, delivered to the agent of the company and forwarded back to the home office of the company in New York. The balance of the premium was paid by note of $254.00, which the agent discounted at the First National Bank in Baker City, Oregon. A part of it was paid the following December and the balance in the following February. (See Record, Dep. of Stalker, p. 66; Exhibits, pp. 176, 178, 181.) In the following March the insured was killed by a snow-slide in Cornucopia, Oregon. Due notice of his death and proofs of death were thereafter delivered to the company. The company, after a long delay and on July 17th, 1903, denied liability on the contract for the reason, among others, that Mr. Dobler had failed to disclose the fact that he was carrying some accident insurance on his life at the time he made the application. It is shown that the company received this informaton some time in June, 1903. The company never tendered back the premium, but claimed in the court below that the policy was void at its inception, nevertheless it retained the premium. Thereafter, in September, 1903, action was begun upon said policy. Thereafter defendant answered and made several affirmative defenses.

First, it denied that the company had ever delivered the policy or that it had been paid its first premium.

Second, That there was a breach of warranty on the part of the insured in that he had not correctly stated his occupation.

Third, That there was a breach of warranty in that Frederick C. Dobler had failed to answer correctly question number 10: "Have you any other insurance on your life?"

Fourth, That Frederick C. Dobler committed a breach of warranty in that he did not answer correctly: "When did you last consult a physician, and for what reason?"

It was shown by defendant in error that said Frederick C. Dobler had paid the premium, as above mentioned, and that the last portion of his premium was paid and the agent of the company forwarded it to the company, including it in a draft payable to the company in the sum of $200.00. (See Stalker's test. and Exhibits, pp. 176, 178, 179, 181.) The company abandoned this defense at the trial and are not now claiming that Mr. Dobler did not pay the first premium.

The record shows that Mr. Dobler was a young man of exemplary habits, held the position of superintendent of a large mine in Oregon, and was in every way a most desirable risk. The defense that he had not correctly stated his occupation was also abandoned at the trial and is not urged here. Defendants are now relying on two alleged breaches of warranty. The first one is that the applicant committed a breach of warranty in failing to men-

tion a $5,000 accident policy he was carrying in the Travelers' Insurance Company of Hartford, Connecticut, in response to the following question, to which he made the following answer:

	Name of Company or Association.	Date Issued.	Amount.
10. "Have you now any assurance on your life? If so, where, when taken, for what amounts and what kinds of policies?	$5,000. Washington Life Combination Bond.	May, 1900.	$500.
Have you any other assurance?	None.		

It was shown at the trial that Mr. Dobler mentioned the fact that he had the $5,000 accident policy, but that neither he nor the agent considered that it was called for in the question; hence he omitted to state it.

The other defense relied upon is that Mr. Dobler did not, in answer to the question, "When did you last consult a physician, and for what reason?" give the name of Dr. Phy. Dr. Phy's evidence discloses the fact that he never was consulted by Mr. Dobler for any disease or ailment. A mere glance at the record will show that when the company was called upon to pay the policy in question, which in all fairness and honesty it ought to have paid without a murmur, it immediately began to search for technical defense to urge against the payment of a just claim. It seems more than passing strange that a company would defend on the ground that a policy had never been delivered or the first premium paid, when the evidence was overwhelming that it had been delivered, the premium paid and the company had it in its possession prior to the death of the insured.

BRIEF ON MERITS.

I.

THE FIRST ASSIGNMENT OF ERROR IS NOT WELL TAKEN. THE EVIDENCE COMPLAINED OF WAS STRICKEN OUT ON MOTION OF COUNSEL FOR PLAINTIFF IN ERROR.

By an examination of the record, on pages 74 and 75, it will be found that the answer to the question complained of was stricken on motion of counsel for plaintiff in error. The following is the record:

Interrogatory No. 19: "Did you assist F ederick C. Dobler in the preparation of said application? If so, how?"

To which counsel for plaintiff in error objected, on the ground that the written contract between the parties is entirely clear and unambiguous and this was an attempt on the part of witness to interpret the contract, which is a matter within the province of the court. The objection was overruled.

The answer read as follows:

A. "I did." "I instructed him as to the answers called for by the questions contained in the application on information furnished me by him and informed him what the correct answer to such questions would be on the information given me."

Counsel for plaintiff in error then said:

"I move to strike out the answer after that first part: I did. After that part."

The court then said:

"I will grant the motion to strike out the answer."

We think it clear that the court thus excluded the whole answer, or all the testimony complained of. Counsel had objected to the interrogatory No. 19 being answered at all, which was overruled. The question was then read and the counsel for plaintiff in error made the motion to strike out the whole answer with the exception of the words, "I did." The court having heard the answer read, and having both the original objection in mind as well as the motion to strike, said:

"I will grant the motion to strike out the answer."

We think this is the only proper construction to be put upon the language of the court, considering the whole record. That this was the intention of the court was manifest from the sustaining the objection of the counsel for plaintiff in error of interrogatory No. 21. (Record, page 73), as follows:

Interogatory No. 21: "Did you assume to state and write out in correct language and proper form answers to questions in parts 1 and 2, or either of them, upon the information given you by Frederick C. Dobler?"

This testimony was offered to meet the defense that there was a breach of warranty on the part of Frederick C. Dobler in not answering correctly and truthfully questions contained in parts 1 and 2 of the application. If it is claimed by the plaintiff in error that the court did not strike out the whole question, but left standing that part of it included in the words, "I did," even if this court

agrees with this contention of counsel for plaintiff in error, it is not error under any circumstances. The mere fact that the agent of the Insurance company said that he assisted the applicant in preparing the application could not prejudice or injure the defendant in any manner.

II.

THE COURT PROPERLY ADMITTED THE EVIDENCE OF THE INSURANCE AGENT, MR. STALKER, SHOWING THE MEANING GIVEN BY THE PARTIES TO THE WORDS CONTAINED IN QUESTION 10 OF THE APPLICATION, AT THE TIME THE APPLICATION WAS MADE.

There are several reasons why the court did not commit error in admitting the evidence complained of in plaintiff's assignment of error No. 2, as follows:

"Interrogatory 22. Referring to question 10 in said application, part 1, were you aware and informed by Frederick C. Dobler, at the time of preparing the application mentioned, that he, the said Frederick C. Dobler, was carrying $5,000.00 accident policy in the Travelers' Insurance Company of Hartford, Connecticut, state fully?"

"A. I was. He told me he was carrying $5,000 accident insurance in the Travelers' Insurance Company of Hartford, Connecticut, and he also called my attention to a policy for $1,000 accident insurance that he carried in another company (the name of which I do not remember). I was also aware of the fact that he carried $5,000.00 in the Washington Life of New York; he took particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident

insurance likewise the $1,000 accident policy was not called for in answer to question 10 in application of Mutual Reserve Life Insurance Company.''

Plaintiff in error insisted in one of its defenses that there was a breach of warranty in that the applicant did not truthfully answer question 10 of the application, as follows:

		Name of Company or Association	*Date Issued.*	*Amount.*
10. "Have you now any assurance on your life? If so, where, when taken, for what amounts and what kinds of policies?	$5,000.	Washington Life Combination Bond.	May, 1900.	$500.
Have you any other assurance?	None.			

At the time of the making of the application, applicant Dobler had $5,000 of strictly accident insurance in the Travelers' Insurance Company of Hartford, Connecticut, which, as will be seen, was not mentioned in answer to question 10. It is admitted that the applicant did state correctly and truthfully all the life insurance he was carrying, and that the same was mentioned in answer to the question. We claim that there was no error in the admission of the evidence complained of, for the following reasons:

A

In the first place, we contend that the question did not call for a disclosure of the accident policy; hence no error in the court's admission of the evidence showing why the parties omitted to mention the accident policy. A moment's thought will convince one that in common parlance, as well as in fact, there is a clear and well defined distinction between insurance for life, or life insurance,

and accident insurance. This distinction appears clearly in all legislation on the two subjects. Legislation affecting the one does not ordinarily affect the other. When legislatures intend to enact laws affecting accident insurance, they speak of it distinctly as accident insurance, and when they enact laws in reference to life insurance, they always speak of it as life insurance, or insurance for life. When one speaks of insurance on his life, or the amount of insurance he is carrying, he does not ordinarily include accident insurance, but mentions that kind of insurance as separate and distinct from insurance he is carrying upon his life. The object and purpose of the two kinds of insurance are entirely distinct. The one is payable in case of an accident to the person, under specified circumstances. The amount varies in accordance with the nature of the injury. The only thing in common between them is that if death occurs by accident the accident insurance company pays the specified amount as well as the life insurance company. In everything else they are entirely distinct and separate. Companies insuring against accidents do not inquire, and care not, what may be the age of the party; whether his health is perfect or imperfect; it is immaterial to it what is his expectancy of life; it is immaterial to it whether his family is predisposed to consumption, insanity or any other disease. It issues policies only for specified times, ordinarily not longer than one year. Its rate of insurance does not depend upon the age of the person, or his condition of health. The inquiries made by the accident insurance companies do not in any manner cover the grounds made by those of a life insurance company. The fact that a party is carrying accident

insurance is a matter that is entirely immaterial to a life insurance company. It is common knowledge that life insurance companies do not intend to inquire concerning accident insurance. It is of so common knowledge that we think the courts may properly take judicial notice of the fact. Any inquiry of any insurance agent or any insurance company will disclose the fact that they never seek to obtain from an applicant information whether he is carrying accident insurance or not. Life insurance, on the contrary, insures against the inevitable; it insures ordinarily for life, and the indemnity is payable at the death of the insured, no matter how it may occur, except in cases of self destruction. The inquiries commonly made of the applicant cover an entirely different field from those made by accident insurance companies. It is material to the life insurance company to ascertain the amount of other life insurance that the applicant is carrying; to know whether the applicant has been refused insurance by other insurance companies. It is material to know the condition of the health of the applicant; to know the family history of the applicant; to know whether his family is predisposed to consumption, insanity or other hereditary diseases. The authorities sustain our contention that question 10 did not call for disclosure of accident insurance. If the one includes the other why is one called accident insurance, the other life insurance? This distinction we are urging was before the 5th Circuit Court of Appeals in the case of Fidelity & Casualty Company vs. Dorough, 107 Federal Reporter, 389. The case arose in Texas, where there is a statute to the effect that if a life or health insurance company resisted the payment

of a claim and suit was brought upon it and judgment recovered, the insurance company should pay an attorney's fee to the plaintiff. In this case, the beneficiary brought an action upon a resisted claim by an accident insurance company and claimed that she was entitled to recover attorney's fee; the court held that there was a well defined distinction exsisting between life and health companies and accident insurance companies. The court uses this language:

"It is conceded there is no law in the state of Texas authorizing the damages and attorney's fees awarded in the verdict and judgment in this case, unless it be found in article 3071, Rev. St., Tex., adopted in 1895, as follows:

" 'Art. 3071. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss.'

"This section was a part of an act originally passed on May 2, 1874, prior to which time there were no statutes in the state of Texas regulating insurance companies. Other sections of the act of 1874, and afterwards incorporated in the Revised Statutes, are as follows:

" 'Art. 3073. It shall be unlawful for any life or health insurance company to take any kind of risks or issue any policies of insurance except those of life or health, nor shall the business of life or health insurance companies in this state be in any wise conducted or transacted by any company which in this, or any other state or country, is engaged or concerned in the business of marine, fire, inland or other insurance.'

" 'Art. 3061. It shall not be lawful for any person to act within this state as agent or otherwise in soliciting or receiving applications for insurance of any kind whatever or in any manner to aid in the transaction of the business of any insurance company incorporated in this state or out of it, without first procuring a certificate of authority from the commissioner of agriculture, insurance statistics and history.'

"In February, 1875, another act was passed regulating the business of fire, marine, and inland insurance companies. See Rev. St. Tex. arts. 3074, 3085. And in April, 1895, an act was passed which, among other things, defined and distinguished life and accident insurance companies as follows:

" 'Art. 3096a. A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, conditioned upon the continuance or cessation of human life, or involving an insurance guarantee, contract or pledge, for the payment of endowments or annuities. An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, conditioned upon the injury, displacement or death of persons resulting from traveling or general accident by land or water.'

"Chapter 55 of the laws of 1895 provides as follows:

" 'That there is hereby imposed upon and shall be collected from each and every person or firm acting as general agents of life, fire, marine and accident insurance companies who may transact any business as such in this state, an annual occupation tax of fifty dollars.'

"In *Association vs. Yoakum,* 39 C. C. A. 56, 98 Fed.

251, followed in *Insurance Co. vs. Ross,* 42 C. C. A. 601, 102 Fed. 722, this court held that article 3071, above quoted, being in force at the time the contract of life insurance was made, became as much a part and parcel of the contract as if it had been expressly incorporated in the policy, and that as against life insurance companies doing business in the state of Texas after article 3071 became a law, and issuing policies thereunder, said article was not in violation of the Constitution of the United States. The question presented here, however, is not necessarily one of constitutionality of the said article in respect to the Constitution of the United States, but, rather, of its applicability to accident insurance companies. The contention was made below, and evidently allowed by the circuit court, and is renewed here, that an accident insurance company is a life or health insurance company, and therefore the statute applies. We have quoted the sections of the statute of Texas bearing upon insurance companies, and we think it plainly appears therefrom that accident insurance, in the legislative mind, was distinct from life and health insurance. The definitions of a life insurance company and of an accident insurance company, as given in the statutes above quoted, show this distinction: One is conditioned upon injuries resulting from traveling, or general accident by land or water. Outside of this defining statute quoted, it is common knowledge that the one insures against the inevitable, with the intent that eventually the amount of the policy shall be paid to the beneficiary; the other insures against the accidental, with the intent that the liability of the insurance company to pay the amount or amounts stipulated shall attach only on the occurrence of bodily injuries to the insured, sustained through external, violent, and accidental causes. The distinction between accident insurance and health insurance is equally clear. Accidental injury may happen; sickness and infirm health may be considered as inevitable.

In the one the amount of indemnity stipulated may never become due; in the other, if the policy is kept in force the indemnity stipulated is certain to become due."

Fidelity & Casualty Co. vs. Dorough, 107 Fed. 389.

To the same effect is *Tickten vs. Fidelity & Casualty Company of New York,* 87 Federal Reporter, 543. The question in this case arose on the construction of a Missouri statute to the effect that in suits upon policies of insurance on life the company cannot defend on the ground of suicide, unless the applicant intended to commit suicide at the time of making the application. In this case the accident insurance company resisted the claim on the ground that the defendant had committed suicide. The beneficiary claimed that under the statute of Missouri this defense was not open to it. The court held that the words, "insurance on life," did not include accident insurance.

" 'Sec. 5855. In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void.' "

"The question of controlling importance to be decided is: Does this statute apply to an accident policy? The time at my command will not permit more than to briefly state the conclusions I have reached on this question. By the express terms of said section it is limited to 'policies of insurance on life.' Clearly, therefore, there

is no escape from the proposition that, unless an accident policy can be held to be a policy of insurance on life, this statute affords no shelter to the defendant. It being a statute in contravention of the common-law rule, affirmative legislation changing the rule at common law is indispensable. From the very inception of any legislation in this state respecting the subject of policies on life insurance, such policies have been distinctively recognized as *sui generis*. Provisions peculiarly and exclusively applicable thereto have, in lines broad and distinctive, run through the different statutes. When accident insurance policies were provided for in acts of the legislature, provisions and requirements peculiar to them were as distinctively present and observed. This was confessedly so until the statue of 1889, when life insurance companies were for the first time authorized to engage in the business of issuing accident policies. Section 5,811, Rev. St. Mo. 1889, amending section 5938 Rev. St. Mo. 1879. Prior to this amendment, no lawyer ever contended that these two business associations were not erected as separate departments, as distinct as any other two business concerns erected under the statutes of the state providing for the creation of business corporations. And, as up to the enactment of the last named statute, no life insurance company created under the laws of the state of Missouri, or doing business therein, was permitted to enter into the business of issuing accident insurance policies n the state, when the legislature declared that, in suits upon policies of insurance for life, it should be no defense that the injured had died by suicide, the rule '*Expressio unius est exclusio alterius*, precluded carrying this special enactment over to any other claim of insurance than that of insurance on life proper.''

Ticktin vs. Fidelity & Casualty Company of New York, 87 Fed. 543.

Suppose a party should borrow money from a bank, upon his statement that he had $10,000 life insurance, which he agreed to assign to the bank as security for the money he was borrowing, and later should bring to the bank a $10,000 accident policy; would anyone contend for a moment that his original statement was correct, or that he had fulfilled the letter of his agreement? Certainly the accident insurance in such a case would not be what the parties would understand was meant when they entered into such an agreement.

Suppose two persons affected a co-partnership on the agreement that each should carry $5,000 "life insurance" to meet any liabilities of the co-partnership in case of the death of either partner, and one of the partners should take out a $5,000 accident policy, would it not be a violation of the spirit and letter of the agreement? Would not the other co-partner have a right to complain? Examples of this kind might be multiplied indefinitely, all of which would show clearly that in ordinary parlance the words "accident insurance" and "life insurance" are constantly considered as two distinct forms of insurance. If life insurance and accident insurance mean one and the same thing, what is the use of the two words,—accident insurance to designate one form of insurance and life insurance another form? The case of *Penn Mutual Life Insurance Company vs. Mechanics' Savings Bank & Trust Company*, 72 Federal Reporter 413, is in point. In fact, the court goes much further in this and subsequent cases which we will cite than is necessary to sustain our contention in this case. The applicant in this case was asked: "Have you your life insured in this or any other company?

If so, give the name of each company and amount of each policy.'' The applicant answered stating all of the regular life insurance he was carrying in different companies, but omitted to mention the fact that he was carrying a policy of insurance in the Knights of Pythias and Royal Arcanum Mutual Aid Associations. The policies in this case were on the life of the applicant, payable at his death, and the contract in such cases is very similar to that of a strictly life insurance company. The information solicited in each case is largely the same. The age of the insured in each case determines the amount of the premium; the employment and health of an applicant are inquired into particularly in each case. The predisposition of the insured or his family to such diseases as consumption, insanity, etc., is material in each case and is inquired about. Yet, there is a broad distinction recognized commonly among insurance companies and individuals between the two kinds of life insurance. The weight of authority is to the effect that unless life insurance in mutual aid and franternal societies is specifically inqured about it is not included in the question. This being true, it would seem that there could be no serious question in the mind of the court that accident insurance, which does not cover the same field, is not included in such a question. Judge Taft, speaking for the court, uses this language:

''The circuit court was right in holding that within the scope of the question, 'Have you your life insured in this or any other company? (If so, give the name of each company and the kind and amount of the policy),' were not included Schardt's certificates of insurance in the Knights of Pythias and Royal Arcanum Mutual Aid Associations. It will be conceded that these associations,

which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member insuring upon certain conditions the payment of a sum certain to the member's representatives on his death, has much resemblance in form, purpose and effect to an insurance policy, is true; and, if we were called upon to give the application a wide and liberal construction in favor of the insurance company, we might properly hold that the question embraced in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such a construction might be warranted by the probable purpose of the question to enable the company to judge how great a motive his life insurance would furnsh the applicant for self-destruction, or the fraudulent simulation of death. But we are here considering a contract and application drawn with great nicety by the insurance company, and framed with the sole purpose of eliciting from the insured full information of all the circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. We cannot presume the company to have been ignorant of the fact that large numbers of persons have taken out life insurance in mutual benefit associations which are not ordinarily described as insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all. *Insurance Company v. Chamberlain,* 132 U. S. 304, 10 Sup. Ct. 87. Having in view the well-established rule that insurance contracts are to be construed against those who frame them (*Indemnity Co. v. Dorgan,* 16 U. S. App. 290, 309, 7 C. C. A. 581, 58 Fed. 945; *Insurance Co. v. Crandal,* 120 U. S. 527, 533, 7 Sup. Ct. 685), and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit

and social society was not within the description, 'policy of life insurance in any other company.' We are fortified in the conclusion by the fact that this contract is a Pennsylvania contract, and the courts of that state have uniformly held that mutual aid associations and insurance companies are so clearly to be distinguished that statutes applying to insurance companies and their policies do not have application to mutual aid assocations, and the certificates of life insurance which they issue to their members."

To the same effect is the decision of the United States Supreme Court in the case of *Continental Life Insurance Company vs. Chamberlain*, 132 U. S. 304, 33 Law Ed., 341.

In this case, the application contained this question: "Has the said party (the applicant) any other insurance on his life; if so, where and for what amount?" The answer was, "No other." He omitted to mention the fact that he had several certificates of membership with certain co-operative or fraternal insurance companies. The question was whether the failure to mention these certificates rendered the policy void. Speaking of this the court says:

"The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. *Such proof does not necessarily contradict the written contract.* Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind

of insurance inquired about did not include insurance in co-operative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative assocations. The answer of 'No other' having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance.''

The same question arose in the case of *Equitable Life Assurance Society vs. Hazlewood,* 12 S. W. 621, and the court disposed of it in the following language:

''The application for insurance contains the following questions and answers: ''Is any negotiation for other insurance now pending or contemplated?' to which the insured answered in writing, 'No.' 'Has a policy ever been applied for which was not thereafter issued, or which, if issued, was modified in amount, kind, or rates? If yes, for what company, and when?' to which the insured answered in writing, 'No.' There was conflicting evidence as to whether the insured had not applied for membership in an order known as the 'Legion of Honor.' Plaintiff was permitted to prove, by the agent of the corporation by whom the application was secured, that pending negotiations between him and the insured, and before the insured made answer to said questions, he (the insured) asked him (the agent) 'what was meant by that,—if it referred to assessment companies or mutual companies.' Witness explained that it did not; and the insured then said he had made application to the Legion of Honor for assurance, whereupon witness told him that the Legion of Honor was a mutual company, and was not regarded as a life in-

surance company, and he was instructed by the general agent of defendant not to consider them as assurance companies. We think the evidence was properly admitted in each instance.''

Mr. Bacon, in his work on Life Insurance, Section 235 A, says:

''Whether or not beneficiary societies are embraced in the question as to other insurance is not entirely settled, but it has been held that the act of the agent in stating to the applicant that certificates in beneficiary societies are not regarded as life insurance, is binding upon the company.''

The Fourth Circuit Court of Appeals, in the case of *Fidelity Mutual Life Association vs Miller,* 92 Fed. p. 63, at pages 72 and 73, reviews this question and cites with approval the case of Penn Mutual Life Insurance Company vs. Mechanics'Saving Bank & Trust Company, *supra.* After quoting very freely from the opinion in that case, it says:

''Can it be said from this description that the certificate of membership in this secret order came within the language used in the application for the policy: 'That I have never made application for insurance on my life to any company, association, or society?' 'Give name of each company, date of application, kind of policy, and amount applied for.' This last inquiry, read in connection with the first, shows clearly that it was a policy in some 'company' about which information was sought, and that in the first inquiry the words 'company, association, or society' all referred to one and the same thing, viz. to an insurance company; and, besides, while in their broader sense and acceptation, the words 'company, association, or society' may cover a beneficial order, it will not be main-

tained that in ordinary life insurance parlance they mean any such thing. An 'insurance company,' and 'insurance association,' or 'insurance society,' all mean one and the same thing; that is, regular insurance. Hence, in the second inquiry, the name of each 'company' was alone requested. The plaintiff in error itself is an insurance association, as distinguished from a company, and there are companies and societies in abundance; for instance, 'The Equitable Life Assurance Society,' 'The New York Life Insurance Company,' etc., all meaning the same thing. We do not feel that there can be any serious doubt as to the correctness of this conclusion—particularly when, as we have shown, questions of doubt and ambiguity as to the meaning of the policy should be resolved against the company issuing the same."

The weight of authority is certainly in favor of our contention that question No. 10 did not call for a disclosure of accident insurance. We have not been able to find a case decided by the highest tribunal of any state, wherein it was held that accident insurance is included within the term "life insurance." As shown by Judge Taft in the case heretofore cited, the weight of authority is that even fraternal insurance, or insurance in mutual benefit orders or associations is not included in the inquiry as to what life insurance the applicant is carrying. If this form of insurance, which indemnifies the applicant for the term of his natural life, payable at his death, no matter how it may occur, is not included in the term "life insurance" as ordinarily used in applications, it certainly needs no argument to show that accident insurance is not included in such a question. One thing is sure, that very eminent courts have sustained our view; others have said it was doubtful whether the question called for fraternal insur-

ance or insurance in mutual benefit orders or associations; none have held that accident insurance is included in the term "life insurance." The most that plaintiff in error can claim is that eminent courts disagree as to the meaning of the question. If this be admitted, plaintiff in error must fail under the general rules regulating the construction of insurance contracts. We will state the rules of construction by quotations from eminent authorities. These rules have such abundant authority to support them and are so constantly reiterated that they may be termed maxims of the law.

"We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain insconsistent provisons, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract. *Thompson vs. Phenix Ins. So.* 136 U. S. 287, 34 L. Ed. 408, 10 Sup. Ct. Rep. 1019; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. Ed. 536."

McMaster v. N. Y. Life Ins. Co. 183 U. S. p. 25; 46 L. Ed. p. 65.

"If an insurance company intends its policy to mean otherwise it must express that intention more distinctly than was done by the defendant. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructons, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company. *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 678 (24:563:565)."

Thompson v. Phenix Ins. Co. 136 U. S. p. 287, 34 L. Ed. 408.

"In case of doubt it is not only to be construed against them, but it is further subject to the rule of construction that it must be understood in the sense in which the insurers knew that the assured understood or would naturally understand it. In law the term 'premises' in an instrument is often used to refer to whatever precedes: * * * This provision of the Atlantic Company's policy should, I think, be held to refer only to other policies that are upon substantially the same risk, i. e. upon essentially the same subject matter, and upon the same essential terms and conditions of the policy as well. As these 'disbursement' policies are so wholly different from the others as to subject-matter, terms and risks, and do not cover partial loss, I am of the opinion that they should not be deemed within the language or intention of the provision quoted."

International Nav. Co. v. Atlantic Mut. Ins. Co. 100 Fed. Rep. 304.

"This interpretation is the same as that which the agent of the company who issued this policy testified he had acted upon in transacting the business of the company at that place. He was supplied by it with blank policies and these clauses to be used as occasion should require, and when other insurance was intended to be permitted he used the 'three-fourths clause,' which covered the whole subject once for all.

"But, if this conclusion were not so clear as it seems to us to be, and were only a permissible one, there are several established rules of construction applicable to the subject which concur in inducing the same result. One of those rules is that forfeitures are not favored in law, and the court will seek to find, if fairly possible, such a construction of the contracts of parties as will relieve them from the inequitable consequences arising therefrom. *New York*

Indians v. U. S., 170 U. S. 1, 25, 18 Sup Ct. 531; *Tiffany v.Bank,* 18 Wall. 409; *Cotten v. Casualty Co.,* 41 Fed. 506; *Jackson v. Same,* 21 C. C. A. 394, 75 Fed. 359; *May Ins.* (2nd Ed.) 170, 376. Another rule which is especially, but not solely, applicable to insurance contracts is that, when the meaning of the instrument, taken as a whole, is doubtful, its several provisions should be construed favorably to the party to whom the undertaken is made, and most strongly against the party in whose interest the provisions are introduced. *Insurance Co. v. Wright,* 1 Wall. 456, 468; *National Bank v. Insurance Co.,* 95 U. S. 673, 678; *Moulor v. Insurance Co.* 111 U. S.335, 4 Sup. Ct. 466; *Insurance Co. v. McConkey,* 127 U. S. 661, 666, 7 Sup. Ct. 1360.''

Palatine Ins. Co. v. Ewing, 92 Fed. 111.

''If it intended that the conditions under consideration should thus apply, why did it not say so? We think that this condition refers to a mill or manufactory in the sense only of a building used for milling or manufacturing, and that it has no application to the personal property covered by the policy.

''Moreover, if there is a reasonable doubt as to the meaning or application of this clause, it should be construed most favorably to the insured, because the insurer prepared and executed the contract, and is responsible for the language used. *Kratzenstein v. Assurance Co.* 116 N. Y. 54, 59, 22 N. E. Rep. 221; *Dilleber v. Insurance Co.,* 69 N. Y. 256, 263. As was said by this court in a recent case: 'The defendant is claiming a forfeiture. When a clause in a contract is capable of two constructions, one of which will support, and the other defeat, the principal obligation, the former will be preferred. Forfeitures are not favored, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit

of the right or indemnity for which he contracted.' *Baley v. Insurance Co.,* 80 N. Y. 21, 23."

Halpin v. Ins. Co., 23 N. E. p 989.

"For the purpose of upholding the contract of insurance, its provisions will be strictly construed as against the insurer. *McMaster v. Insurance Co.,* 55 N. Y. 222; *Dillebar v. Insurance Co.,* 69 N. Y. 256. When its terms permit more than one construction, that one will be adopted which supports its validity, (*Coyne v. Weaver,* 84 N. Y. 386); and it is only when no other is permissible by the language used that a construction which works a forfeiture will be given to such an instrument, (*Hitchcock v. Insurance Co.,* 26 N. Y. 69; *Griffey v. Insurance Co.,* 100 N. Y. 417, 3 N. E. Rep. 309). The reason assigned for such rule of construction is that the insurer is supposed to have chosen the language to express the terms of the contract, and it has become a rule of law that, if it be left in doubt whether words of the contract 'were used in an enlarged or restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee.' *Hoffman v. Insurance Co.,* 32 N. Y. 405, 413. There is nothing in the language of the policy to indicate that the defendant had reason to suppose that the promisee understood that suicide of the member came within its terms; and words may easily have been employed to embrace it within a condition, if it had been in the contemplation of the defendant as an act of forfeiture of the claim of the beneficiary upon the contract."

Darrow v. Family Fund Society, 22 N. E. 1093.

If the language of an application may be understood in more than one sense, it is to be construed most strongly against the insurer and in favor of the insured.

Bayley vs. Employers' Liability Co., 125 Cal. 345.

The answers in an application should receive a reasonable, not technical, construction, one within the minds of the parties when they prepared the contract.

A. O. U. W., vs. Belcham 145 Ill. 308, 33 N. E. 86.

Question 10 of the application, reading as follows: "Have you now any insurance on your life? If so, where taken, what amount and what kind of policy? Have you any other assurance?" should be read in connection with question 11, which is in part as follows: "Has any proposal or application *to insure your life* or for membership ever been made to any company, association or agent, etc.?" Also in connection with question 12, which reads in part as follows: "Has any proposal or aplication to assure *your life* or for membership in any company or association now pending, etc?" Also in connection with questions 8 and 9 in part 3 of the application. (8) "Compared with the averages of lives of the same age and sex, do you believe the applicant likely to live the full expectancy?" (9) "Everything considered, what is the maximum amount of insurance that in your judgment can safely be issued upon *this life?*" These other questions we think clearly show that all of these inquiries were directed solely to insurance upon life and for the full term of his life, or what is commonly termed life insurance as distinguished from accident insurance.

"In construing or interpreting the meaning of a contract, or the meaning of any term or phrase in the contract,

the whole contract should be examined in reference to its object or purpose, and it is the duty of the court to construe any phrase or term that is not ambiguous standing by itself by other terms or conditions of the contract that modify or qualify the meaning of such unambiguous phrase or term in the contract.''

> *O'Brien v. Miller,* 168 U. S. 287 on p. 297; 42 Law. Ed. 472.
>
> *McClain v. Ins. Co.,* 110 Fed. p. 80.

B

There is a strict similarity between the present case and that of the *Continental Insurance Company v. Chamberlain,* 132 U. S. 304. This case is entirely dissimilar to that of the *Northern Assurance Co. v. Building Association,* 183 U. S. 308, relied upon by plaintiff in error.

We have already reviewed to some extent the Chamberlain case. The facts in that case are almost identical with those in this case. In each case the application required the insured to state what other insurance he had upon his life. In the Chamberlain case the applicant omitted to mention some insurance in co-operative insurance companies, which the company insisted was a breach of warranty. In the language of the opinion of the court in that case, ''It was admitted at the trial that at the date of Steven's application he had insurance in co-operative companies to the amount of $12,000.'' This insurance was payable at death. It must be conceded, we claim, that this form of insurance has far more resemblance to, and would be more properly included in the question than accident

insurance. In this case it was admitted at the trial that the applicant had a $5,000.00 accident policy in force at the time that the application for the policy in question was made. In both cases the insured and the agent of the company were of the opinion that the insurance omitted was not called for by the question, hence the omission. In both instances the application was made and the policy delivered in a state where statutes were in force making the soliciting agent the agent of the company. The record in the case at bar discloses the fact that the application was made at Baker City, Oregon, and the policy was delivered there and the premium paid there, making it an Oregon contract and the statute of Oregon a part of it. See record, pp. 163, 178, 179, 180, 181.

In addition to this, the record shows that, pursuant to the laws of Oregon, the plaintiff in error had appointed in writing Mr. Stalker, its agent. The appiontment reads in part as follows:

"That the said party of the second part is *hereby appointed representative of said company for the purpose of procuring applications of assurance therein* in the territory embraced in this agreement, and for the further purpose of appointing suitable sub-agents on terms to be approved by the company, subject to the terms and conditions herein. This appointment is on the following terms and conditions, which are agreed to by each party hereto: The district in which said party of the second part shall have the right to work shall embrace the States of Oregon, Washington, Idaho and Montana, but the said district is not assigned exclusively to the said party of the second part."

There is nothing in the balance of the writing ap-

pointing him as agent that in any manner limits his authority as a "representative of said company for the purpose of securing applications for insurance."

Rapalje in his law dictionary defines "representative" in these words: "A representative is a person who represents or takes the place of another."

Mr. Bouvier in his dictionary defines the word as: "One who represents or is in the place of another."

The Standard dictionary defines the word "representative" when used as a noun as "Ono who, or that which represents another person or thing; one who, or that which is fit to stand as a type * * * a person commissioned to represent his government or soverign at the court or in the court of another; an ambassador or other public minister; one who with respect to another's property stands in his place and represents his interests."

Then in truth and fact the agent had full power to represent the company, to speak for the company in all matters pertaining to the application for insurance. In that field and to that extent he had full power to speak for, to represent, the company; in all matters affecting the procuring of the application he stood for and took the place of the company itself. It placed its literature, its printed form of application containing questions to be propounded to and answered by the applicant, in his hands. Being thus armed with the company's printed form of application and its writing appointing him its "REPRESENTATIVE IN PROCURING APPLICATIONS," what more natural than that the insured should

look to him to explain the meaning of any term or question contained in the application? What more could he have had to induce the applicant to rely upon the meaning he should give to a question, or to words or phrases contained in the application? If an applicant were in doubt about the meaning of such a word or phrase, would it not be the natural thing for him to refer to the ''Representative of the company'' for its meaning? He certainly was to ''Represent the company in procuring applications for insurance.'' If this did not give him power and authority to explain the meaning of a doubtful phrase or question, we ask in what did he represent the company? If he did not have this authority, it would seem as though he had no authority at all and could not represent the company at all. If the contention of the plaintiff in error is correct, it would seem that he only represented the company in procuring a large premium in payment of a worthless policy. So we have here not only the statute of Oregon requiring the company, as a condition precedent to its doing business in that state, to appoint agents to fully represent them, but we have the written appointment of the agent ''as the representative of the company in procuring applications for insurance.'' There is nothing in the application to the effect that the agent shall not explain the meaning of any word or question as understood and meant by the company; but if there were, it could not overcome the fact that the company was bound by the actual powers conferred upon the agent by the written appointment of the officers of the company. Such provisions in the application will only apply to soliciting agents where no statute intervenes, or where, in fact, the agent did not have the power to represent the company.

So we claim that the Chamberlain case controls this. The court in that case uses this language:

"If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the acts of the company, by its authorized agent. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company. If he had applied in person, at the home office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the company, by its principal officer, having authority in the premises, had then written the answer "No other," telling the applicant that such was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract."

> *Continental Life Ins. Co. v. Chamberlain,* 132 U. S. 304.

The 8th Circuit Court of Appeals in the case of *New York Life Ins. v. Russell,* 77 Fed. p. 95, is in point. In that case the contract was made in the state of Nebraska where they had a statute similar to the Oregon statute. It follows the Chamberlain case as authority. The application contained language similar to the application in this case. The company defended on the ground that the applicant had committed a breach of warranty sim-

ilar to that in the Chamberlain case. The court in deciding the case uses the following language:

"Without saying in terms that the agent of the company shall be deemed the agent of the insured, the application in this case declares that:

"'No statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises, or information be reduced to writing, and presented to the officers of said company, at the home office, in this application.'

"The obvious purpose of this clause, like that which declared the agent of the insurance companies should be deemed the agent of the insured, is to enable the insurance company to escape from the necessary obligations and liabilities imposed by the law of agency on a principal who commits the conduct of his business to an agent. It is designed to evade a fundemental rule of the law of agency, and to shear its acknowledged agents of their appropriate and accustomed powers and duties, and impose them on the insured. If this application is to receive the construction contended for, no one can safely transact business with an agent of the company; for while he would be bound by his acts and representations and any information communicated to him by the agent, the company will not be bound by the acts or representations of its agent or any information communicated to him in the conduct of the business of his agency. Under such a rule, the rights and obligations of the contracting parties would not be reciprocal; contracts made with the company's agent would be one-sided; and the company could at its own election, avail itself of the acts and representations of its agents when it was profitable to do so, and repudiate them

when they were likely to prove burdensome. The company cannot play fast and loose in this manner. The persons who are authorized by the company to solicit insurance, take applications, or receive premiums in Nebraska are made by statute the agents of the company 'to all intents and purposes;' and it is not in the power of the company to shear these statutory agents of the powers and authority with which the law, for the protection of the public dealing with the company, invests them. These powers are precisely those which an agent of an insurance company possesses, upon whose powers and authority no special limitations have been imposed."

"Insurance companies perfectly understand the fact that these applications, which are framed by themselves, and furnished to their agents, are filled up, and the answers to the questions written down, by their agents, and that every applicant accepts without question the advice, direction, and assurance of the agents in all matters relating to the preparation of the application. This is a part of the duty of such agents, and the applicant has a right to assume that they will discharge it intelligently and honestly. He has a right to assume, also, that the agent will honestly and faithfully discharge his duty to his principal.

C.

The Chamberlain case is decided on two propositions, either one of which would have caused that court to sustain the judgment of the lower court and either one of which we claim will require this court to affirm the lower court.

In the first place, it held that under the statute of Iowa, as we have shown, the company was bound by the

construction that the agent placed upon the meaning of the question. In the second place, it held that the meaning of the question itself was not so absolutely certain as to preclude proof as to what kind of life insurance the contracting parties had in mind when the question was answered. In this case we have shown, we think, that, upon a fair construction of the question, it did not call for a disclosure of accident insurance; that at least, under the decisions we have cited, if there was a question about it, it was competent for the court to admit the testimony of the insurance agent as to the meaning that the agent gave to the question. The evidence was admissible for this purpose. In such a case the evidence does not vary, or tend to vary, the term of the contract, but simply explains the meaning of an ambiguous word. The purpose of the evidence is to show the construction that the parties themselves placed upon the word at the time that it was made. The evidence disclosed the fact that the insured wanted to know if the question called for a disclosure of accident insurance which he did not consider that it did. It also disclosed that the agent, the "Representative of the company," did not consider that it called for a disclosure of accident insurance; so both, acting honestly and fairly, omitted to mention the accident insurance. Mr. Dobler was not trying to conceal anything, but was anxious to correctly answer the question. It is evident that Mr. Dobler did not understand that he should mention his accident insurance; that he understood "insurance on life" in its common, ordinary sense, such as is used in common parlance. The Chamberlain case, speaking of this further, says:

"It is true that among the 'Provisions and Requirements,' printed on the back of the policy, is one to the effect that the contract between the parties is completely set forth in the policy and the application, and 'none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing, signed by the president or secretary of the company, whose authority for this purpose will not be delegated.' But this condition permits—indeed, requires—the court to determine the meaning of the terms embodied in the contract between the parties. The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative associations. The answer of 'No other' having been written by its own agent, invested with authority to solicit and produce applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance."

The lower court, in deciding this question, followed

the *Chamberlain* case, and, in deciding to admit this testimony, used this language:

"There is undoubtedly grave apparent conflict in the decided cases as to the true rule covering his question; but, after considerable thought on the matter, I have reached the conclusion that in this particular case what took place between the agent and the assured at the time this application was made may be properly received in evidence. It is a part of the *res gestae.* It shows the circumstances under which the application was made and the particular interpretation which was placed by the parties at the time upon this provision found in the application in regard to other insurance. Now, if it were perfectly plain and clear that the answer to that question required the applicant to disclose the fact that he had the accident policy mentioned, then this testimony would not be relevant; but it is not clear. The phrase itself is an ambiguous one. It may call for the disclosure or it may not. It is broad enough; it might be understood by the parties as calling for such disclosure, and, on the other hand, it may be understood by the parties as not calling for such disclosure. Now, the Supreme Court of the United States, in the case of the *Continental Insurance Company vs. Chamberlain*, 132 U. S., say that the purport of the word insurance, in the question, has the same party any other insurance on his life, is not so absolutely certain as in an action upon that policy to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Now, if that is the rule, a presumably reasonable one, to apply to this case, it is broad enough to permit the answer to the question as to what was said by the insurance agent in relation to the answers to be made to that question. Then let us go further, and consider that when the application was made, when it was completed, the matter of receiving it was the act of the agent of the company, and when it was

transmitted to the defendant, going as it did with the construction which he and the assured placed upon it, and when he accepted the money of the assured, the assured supposed he was making a full and complete answer to this question; I think that the company ought to be estopped from insisting upon a literal interpretation of the answer to that question. In other words, that it should be held to give it the same interpretation given it by its own agent at the time. Now, the court in this case *(Cont. I. Co. vs. Chamberlain,* 132 U. S.) say: The purport of the word in the question has the said party any other insurance on his life, is not so absolutely certain as in an action upon that policy as to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was asked. Such proof does not necessarily contradict the written proof. It simply explains it. It brings to the attention of the court and the jury what the parties meant in the use of the particular language which is under consideration.''

Record, pp. 123, 124, 125.

We do not think it necessary to consume much of the court's time in showing the clear distinction between the Northern Assurance Company case and the Chamberlain case. The Northern Assurance Company case, we think, is not in point, and certainly not contrary to the doctrine announced in the Chamberlain case. The Chamberlain case was affirmed by the United States Supreme Court in the case of *McMaster vs. New York Life Ins. Co.*, 183 U. S. 25, which was affirmed by the United States Court on the same day that the Northern Assurance Company case was argued. So it is very clear that the Supreme Court of the United States did not intend or consider that the Northern Assurance Company case in any manner con-

flicted with the doctrine announced in the Chamberlain case. In the Northern Assurance Company case it was provided that the policy would be void if the insured had any other existing insurance on the property, unless consent thereto was obtained in writing and endorsed on the policy. It is admitted that the applicant had other insurance which was not endorsed on the policy. There was a conflict in the testimony between the agent of the company and the insured as to whether the agent was informed of the existence of other insurance. There was no attempt to show that the agent of the company undertook to endorse on the policy the consent of the company to the other insurance. As soon as the company became aware of the fact of other insurance it cancelled the policy and tendered back to the insured the full premium therefor. The language of the policy in the Northern Assurance Company case was not ambiguous. There was no room for construction; its language was plain and clear, and no one who understood the English language could claim that he did not understand its meaning. The insured was not misled to his prejudice by the agent of the company. Here was a clear violation of the terms of the contract on the part of the insured. Judge Shiras, in writing the opinion in the Northern Assurance Co. case, evidently had this distinction in mind when he used the following language:

"In the present case such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued."

From this statement of the case it is perfectly clear that Judge Shiras, writing the opinion, desired to distinguish the decision from those based upon a construction of ambiguous language in a contract of insurance. Further on in the opinion and in citing *New York Ins. Co. v. Thomas,* 3 Johns, case 1, with approval, he quotes this language:

"The parol evidence is to be received in the case of an *ambiguitas latens* to ascertain the identity of a person or thing; but before the parol evidence is to be received in such a case, the latent ambiguity must be made out and shown to the court. In the present instance there is no ambiguity; the language of the contract throughout is consistent and explicit."

In another case which he cites with approval from New York he quotes this language:

"The contract between these litigants on the point which I shall discuss is clear and unambiguous."

The plaintiff in error did not, as in the Northern Assurance Company case, as soon as it learned of the alleged breach of warranty which rendered the policy void at the time of its issuance, return to Mr. Dobler the premium that he had paid upon the policy. It became aware of this alleged breach of warranty long prior to the commencement of the action in this case. It never offered or tendered to Mr. Dobler or his representative the premium thus paid upon the policy. This is an important distinction between the Northern Assurance Company case and the present case. As soon as the company learned of a breach of warranty which existed at its inception, and which was produced and brought about by the conduct of its agent, its

duty was, if it intended to insist upon the breach of warranty, to return the premium that had been paid by Mr. Dobler; but it took the ground that while the policy never had any validity at all, yet it might retain the premium paid upon it. Judge Shiras, in the Northern Assurance Company case, on this point uses the following language:

"There is no finding that the agent communicated to the company or to its general agent at Chicago, at the time he accounted for the premium, the fact that there was existing insurance on the property, and that he had undertaken to waive the applicable condition. Indeed, it appears from the letter of defendant's manager at Chicago, to whom the proofs of loss had been sent, which letter was put in evidence by the plaintiff and is set forth in the bill of exceptions, that the additional insurance held by the plaintiff was without the knowledge or consent of the company; and it further appears, and was found by the jury, that immediately on the company's being informed of the fact, the amount of the premium was tendered by the agents of the company to the insured. So that there is not the slightest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium."

Judge Shiras cites with approval a case from Pennsylvania containing the following language:

"Defendant had notice of the additional insurance on the first Wednesday of November, 1894; notwithstanding that notice to the company, the policy was neither recalled nor cancelled; the premiums or assessments collected were not returned, nor was any effort made to return the premium note given by plaintiff binding him to pay the premiums at such times and in such manners as the company's directors might by law require. These facts were admitted

and if, as the authorities appear to hold, they operated as an estoppel, it will be unnecessary to consume time in the consideration of other questions sought to be raised by several of the specifications of error."

In the case of *McMaster v. New York Life Ins. Co., supra,* the court says:

"To permit the company to deny the acts and statements on which the transaction rested, would produce the same injury to McMasters, no matter what the agent's motives. But what is the proper construction of these contracts in respect to the asserted forfeiture? The company, although retaining the premiums paid and not offering to return them, contends that if McMasters was not bound by an agreement that the subsequent premiums should be paid on December 12th, then that the minds of the parties had not met, becaus it had not contracted except on the basis of payments so to be made; but the question still remains whether the right of recovery in this case is dependent upon such payment on the 12th day of December, 1894, or even thirty days thereafter. * * * On the other hand, can the company deny that McMasters claimed insurance which was not forfeitable for non-payment of premiums within thirteen months after the first payment? If it can, by reason of its own act, without McMaster's knowledge, actually or legally imputable, then the company's conduct would have worked a fraud on McMaster in disappointing, without fault on his part, the object for which his money was paid. The motive of the agent to get a bonus for him-result of his action would be the same."

D.

PLAINTIFF IN ERROR'S CONTENTION THAT THE CLAUSE IN SECTION 10, "HAVE YOU ANY OTHER ASSURANCE?" CALLS FOR A STATEMENT OF ACCIDENT INSURANCE, IS NOT SUPPORTED BY AN EXAMINATION OF THE WHOLE QUESTION.

Question 10 contains three clauses; we have heretofore copied them as they appear in the original application. The first and primary part of the question is: Have you now any assurance on your life? The other clause, Have you any other assurance, means have you any other insurance *on your life* than that mentioned. Examining this question to ascertain the intent of the parties, it should be remembered that the subject matter of the proposed contract was life insurance. The applicant was applying for life insurance to a life insurance company. The interrogatories were all directed to matters that would tend to throw some light on the question of whether the party who was making the application was a good or bad life insurance risk. The question of life insurance would be the one naturally uppermost in the minds of the parties as distinguished from any other form of insurance either on the person applying or his property. In construing question 10 and the clause "Other insurance," the rule *ejusdem generis* applies, according to which, general words following words of a more particular character, are regarded as limited in their meaning by the particular words.

Thus, where a contract for the sale of a patent right provided that the contract should be void if defects were found to exist in the patent whereby all its privileges could not be enforced, or if there should be "any other defects

whatever," the latter clause was held to be controlled by the previous clause, and consequently to refer only to defects in the patent, and not to defects in the machine patented.

Vaughan v. Porter, 16 Vt. 266.

And where an assignment in terms conveyed "all the goods, wares, merchandise, and *personal property of every kind,* belonging to the assignor, it was held not to cover the assignor's interest under a contract; that while the general term "personal property of every kind" was broad enough if standing alone to include such an interest, its association with the preceding particular words showed the intention of the parties to refer to only "visible, tangible property, *ejusdem generis* as goods, wares and merchandise."

And so, in this case, the question in the application, "Have you any other assurance?" is broad enough, if standing alone, to cover all kinds of assurance, such as fire, life, health, accident, marine or employers' liability. But it is shown clearly, by reference to the questions preceding and following it, as well as the subject matter of the contract, to refer to life insurance.

The clause, "Have you any other assurance?" or a similar clause negativing any other assurance than that mentioned in the primary question, has an historical meaning in connection with application for life insurance. Ever since life insurance companies have used blank forms of application the inquiry as to what other life insurance the applicant was carrying has always been made. Many jurisdictions have held that an insufficient answer or a partial

answer to a question where the same has been made a warranty, would not render the policy void, that is to say, the questions and answers in this application having been made warranties, if Mr. Dobler had mentioned a part of his life insurance and omitted to mention a part, it would not be held a breach of warranty by many Supreme Courts. So, in order to compel the applicant to mention all his life insurance, which is a material matter for an insurance company to know, they have generally framed the question and answer as in this case, first to ask the applicant what insurance he was carrying upon his life, then to follow up by a question as in this case, "What other assurance?" thus getting a complete statement by one queston or the other of all the life insurance the applicant was carrying. That was the purpose of this clause. The purpose of this question will readily be seen by examination of the authorities.

Mr. Bacon in his work on insurance, in discussing this proposition, states the rule in the following language:

"Sec. 204. Where partial or no answers are made to questions.—It may happen that a question in an application for insurance is either partially answered or is not answered at all. In the latter case there is no warranty that there is nothing to answer. 'And so,' says the Court of Appeals of New York, 'in the case of a partial answer, the warranty cannot be extended beyond the answer. Fraud may be predicated upon the suppression of truth, but breach of warranty must be based upon the affirmation of something not true.' The question has most frequently come up where the applicant has stated the name of a single physician as his attendant where he has had others; in

such cases the rule has been laid down that where the answer is full and complete so far as it goes and does not purport to cover all possible cases, the company should exact a fuller answer if it desired it.''

To the same effect is Mr. May on Life Insurance, section 166.

''If the company accepts an indefinite or insufficient answer, it will be construed liberally in favor of the insured; as where a question as to how the premises are occupied is answered, 'dwelling, etc.,' this will be held as notice that a saloon is kept there. If the answer be responsive and true in part, but irresponsive and untrue in part, this last will be only a representation. It must be material in order to avoid the policy. If the interrogatory he modified by the phrase 'so far as you know,' this holds the interrogated party not to answer absolutely, but to the best of hs knowledge and belief. If the answer be superfluous and immaterial it has no binding force. If a question is not answered, there is no warranty that there is nothing to answer; and where there is but a partial answer, the warranty cannot be extended beyond what is answered. Warranty must be pased upon the affirmation of something not true.''

So the historical meaning and the technical meaning of the question are identical.

III.

THE COURT DID NOT COMMIT ERROR IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE GROUND THAT THE UNDISPUTED EVIDENCE SHOWED THAT FREDERICK C. DOBLER IN HIS APPLICATION COMMITTED A BREACH OF WARRANTY IN NOT GIVING THE NAME OF PHYSICIANS WHO HAD ATTENDED HIM OR WHOM HE HAD CONSULTED.

This assignment of error is based on the following questions and answers:

Question	Answer
13. A. When did you last consult a physician and for what reason?	A. Do not remember, years ago.
B. Give name and address of last physician consulted.	B. ....
14. A. How long since you last consulted, or were attended by a physician? Give date.	A. Do not remember, long time ago.
B. State name and address of such physician.	B. Name ...... Address ....
C. For what disease or ailment?	C. ....
D. Give name and address of each and every physician who has prescribed for or attended you within the past five years, and for what diseases or ailments and date.	D. Name ...... Address.....
E. Have you had any illness, disease or medical attendance not stated above?	E. ....

The insurance company claimed that Dr. Phy of Baker City, Oregon, had attended and been consulted by Mr. Dobler within the meaning of these questions. That Mr. Dobler had committed a breach of warranty in not giving the name of Dr. Phy in answer to those questions. At the trial Dr. Phy was asked the question if he had ever at-

tended or been consulted as a physician by Frederick C. Dobler for any disease or ailment during his lifetime, to which he answered "No." In a subsequent queston he explained his answer in the following language:

"No; I may add further that I was an intimate friend of Frederick C. Dobler during the last six years of his life, and in conversation with him during our early friendship I had mentioned to him the advisability of persons in general having frequent physical examinations by their physicians as a matter of precaution. Mr. Dobler seemed impressed with this idea, and during the remainder of his lifetime I made several physical examinations of him including examinations of his urine and at no time did I find any physical ailment. All of these examinations were a matter of precaution with Mr. Dobler, and not with any idea that he had any physical ailment. I never prescribed any medicine for him. I did on several occasions advise him concerning hygenic measures which everyone should follow to preserve their health. I never made any charge for these examinations."

He was asked the further question whether in his personal knowledge Frederick C. Dobler was ever afflicted with any disease or ailment; he said "No" and his explanation above quoted, shows that Mr. Dobler never did consult him with any idea that he had any disease or ailment. The words "consult or attend" as used in applications for insurance, have a well known and defined meaning. They have reference to a consultation with a physician or an attendance by a physician for some disease or ailment more or less serious in its character. They have no reference to a mild disease or ailment such as a slight cold or indisposition or such an ailment as would not tend to impair the health or body of the applicant. An applicant might have

been attended once or twice for a cold or the grippe or any slight ailment and still properly answer the question "No." But in this case the applicant never consulted Dr. Phy for even a slight cold or ailment. He apparently was never so afflicted. Question 14 clearly shows that the words "consult or attend" were used in this sense, for a part of the same question is "For what disease or ailment." This clearly appears by reading together subdivisions A and C of Question 14:

A. How long since you last consulted or were attended by a physician?

C. For what disease or ailment?

Questions 13 of Part 1 and 14 of Part 2 should be read together. Our claim is that these questions only included a consultation with a physician or attendance by a physician, is fully supported by the following authorities:

"We pass now to the next question, which is as to the general rule of construction to be applied to the particular words used in the questions and answers which form the application. As to this, the rule given us by the Supreme Court is in some respects more favorable to the assured and in other respects less favorable, than those applied by the courts of the various states, as they will be found conveniently grouped in the notes of section 31 of Cooke's Law of Life Insurance (1891). The key to this expression is in the expression of Mr. Justice Harlan, in *Moulor vs. Insurance Co.*, supra, at page 340, 111 U. S., page 469, 4 Sup. Ct., and page 449, 28 L Ed., that the application must be understood to relate to matters which have a sensible, appreciable form. This rule was applied in *Connecticut Mutual Life Ins. Co. vs. Union Trust Co.*, 112 U. S. 250, 258, 5 Sup. Ct. 119, 28 L. Ed. 708, to the effect that

the questions and answers in an application do not ordinarily concern accidental disorders or ailments, lastng only for brief periods, and unattended by any substantial injury or inconvenience, or prolonged suffering. Indeed, they must have relation to the rule *de minimus lex non curat,* and to a sensible construction, and so they apply, ordinarily, only to matters of a substantial character. Therefore we accept the proposition of the plaintiff in error with reference to the word 'consulted,' found in these questions, that it would not relate to the opinion of a physician concerning a slight and temporary indisposition speedily forgotten."

Hubbard vs. Mutual Reserve Fund Life Ass'n., 100 Fed. 719.

The Supreme Court of Michigan in the case of *Plumb vs. Penn Mutual Life Insurance Co.,* 65 N. E. 611, approved the charge given by the lower court in that case in the following language:

"If you shall find that within the three years she was attended by or consulted with another physician for any serious disorder other than the consultations with Dr. Mills, which I have charged you already about, that would be a breach of the conditions of this application, and a breach of the warranty, and would make this policy void, and the plaintiff in this case could not recover; but I charge it to be the law, as laid down by the Supreme Court of this state in the case of *Brown vs. Insurance Co.,* that a mere calling at a doctor's office for medicine to relieve a mere temporary indisposition, not serious in its nature, or his calling at the applicant's home for the same purpose, could not be considered an attendance within the meaning of this question; but that such attendance must be for some disease or ailment of importance, and not for any indisposi-

tion for a day, or so trivial in its nature, such as all persons are liable to, and yet are considered to be in sound health generally.''

To the same effect is *Billings vs. Metropolitan Life Ins. Co.* 41 Atl. 516, decided by the Supreme Court of Vermont. It disposes of the question in these words:

''In charging the jury, the court among other things, said: 'I instruct you that if, when he consulted physicians—if you find he did—he was not suffering from any disease, or that he did not consult them for a disease, then his answers to the interrogatories I have read (interrogatories 3, 6 and 7) would not render the policy void, and the plaintiff would be entitled to recover, notwithstanding he consulted these physicians, provided she has established her right of recovery in other respects;' to which the defendant excepted. The charge was correct. The question called only for consultation of physicians in respect to matters material to the risk of insuring the life of the insured. If he had consulted them upon matters other than disease or illness of himself, as we have defined them, it was immaterial.''

In the case of *Woodward vs. Iowa Life Ins. Co.* 56 S. W. page 1020, the Supreme Court of Tennessee sustains this view:

'' 'That if the said James W. Woodward consulted a physician, or was prescribed for by a physician, between the times mentioned, for a disease or ailment that was merely temporary—such as was curable, and passed away, and was not a permanent, habitual, and constitutional affliction, and indicated no vice in his constitution, and had no bearing upon his general health and the continuance of his life—in such case you should find for the plaintiff.' We have quoted this much of the charge in order that it

may be seen that the trial judge in fact covered the objection of the defendant below in a very favorable and pointed way.''

In construing the meaning to be given to these words, the Supreme Court of Arkansas in the case of *Franklin Insurance Co. vs. Galligan* 73 S. W. 102, uses this language:

''WOOD, J. (after stating the facts). By the contract of insurance the answers given in the application are warranties. If untrue, they avoid the policy. But they must be construed in the sense contemplated by the parties to the contract. By the questions, 'How long since you were attended by a physician, or had occasion to consult one?' 'State the nature, gravity, and duration of the ailment or disease?' and 'Give the name and address of that physician?' and the answers thereto, the parties had in view some ailment or disease that would affect the contract of insurance. They did not, evidently, have in mind some slight indisposition, or trivial and temporary ailment, that in no wise affected the general health or constitution of the assured, and therefore did not increase the risks of insurance.

To the same effect is *Blumenthal vs. Ins. Co.* 96 N. W. page 17:

''This is an action on an insurance policy issued on the life of Nicholas I. Blumenthal. The defense interposed was false representations and warranties made by the insured in his application for the policy. The particular questions claimed to have been falsely answered, together with the answers given in the application, were the following: 'No. 15. Have you ever had chronic or persistent cough or hoarseness? A. No. No. 16. State particulars of any illness, constitutional disease, or injury you

have had, giving date, duration and remaining effects, if any. A. No disease or illness of any kind. No. 17. When did you last consult a physician? A. About a year ago. Q. For what? A. A cold and cough. No. 21. Give names and addresses of physicians who have attended you. A. C. L. Nauman, M. D., West Branch, Michigan.' "

"It is argued at length by counsel for the defendant that the evidence conclusively shows the assured was suffering from a chronic and persistent cough for a considerable period before the application; that he had, within the period of a year, consulted physicians other than Dr. Nauman; and that his answers to each of these questions were shown to be untrue. It would not be of profit to set out at length the testimony bearing upon the question as to whether the ailments which the assured is shown to have had were such ailments or diseases as to seriously affect the general soundness and healthiness of the system, or whether, on the other hand, it was a mere temporary indisposition, not tending to undermine the constitution of the insured. An examination of the record discloses that this question of fact was sharply controverted at the trial, and that there is abundant evidence that, on the occasions when the assured had consulted physicians, the trouble under which he was suffering was temporary, and yielded to treatment. The law is settled that in a representation, contained in an application for insurance, that the assured is in good health, or that he has not been subject to illness, or that he has not been attended by a physician or consulted one professionally, the answer is to be construed as meaning, in the one case, that he has not suffered an illness of a serious nature, tending to undermine the constitution, and that a state of health is freedom from disease or ailment that affects the general soundness or healthiness of the system seriously. And as to representations as to treat-

ment by physicians, the omission to state a treatment by a physician for some temporary indisposition does not avoid the policy. See *Brown vs. Ins. Co.* 65 Mich. 306, 32 N. W. 610; *Pudritzky vs. Supreme Lodge* 76 Mich. 428, 43 N. W. 373; *Hann vs. Ins. Co.* 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365; *Plumb vs. Ins. Co.* 108 Mich. 94, 65 N. W. 611; *Tobin vs. Ins. Co.* 126 Mich. 161, 85 N. W. 472; *Conn. Ins Co. vs. Trust Co.* 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708."

To the same effect is *Federal Insurance Co. vs. Smith* 86 Ill. 427.

We feel that we have fully answered all the errors assigned by the plaintiff in error. No one can read the record without being impressed with the fact that it would be an outrage on the beneficiary and would be a miscarriage of justice were the plaintiff in error to succeed in its defense. Although the reported decisions of the highest courts of the different states as well as those of the United States are full of cases wherein the defenses made by insurance companies are both unfair and unjust and without the slightest merit, we have not read of any case where the record discloses one more unjust or with less merit.

We ask the Court to affirm the judgment.

Respectfully submitted,

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